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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

DR. LEEVIL, LLC,  
  
Plaintiff and Appellant,

v.

WESTLAKE VILLAGE  
PROPERTY L.P. et al.,

Defendants and  
Respondents.

2d Civil No. B296987  
(Super. Ct. No. 56-2014-  
00450995-CU-OR-VTA)  
(Ventura County)

Mid-Wilshire Property L.P. and Westlake Village Property L.P. (collectively, Respondents) incurred late charges after they failed to make balloon payments when their loans came due. After Dr. Leevil, LLC, purchased those loans, it pursued a claim declaring the charges valid. (See Code Civ. Proc.,<sup>1</sup> § 1060.) The trial court determined that they were not, and granted Respondents' motions for summary adjudication and

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<sup>1</sup> Further unlabeled statutory references are to the Code of Civil Procedure.

judgment on the pleadings. Leevil appeals from the judgment entered after the court granted those motions, contending: (1) the motion for summary adjudication was procedurally defective (see § 437c, subd. (f)(1)), (2) Respondents' loan agreements authorized the late charges, and (3) the charges did not constitute unreasonable liquidated damages (see Civ. Code, § 1671, subd. (b)). We affirm.

#### FACTUAL AND PROCEDURAL HISTORY

In January 2008, Mid-Wilshire took out a five-year loan from TomatoBank, NA, for \$4,322,500. The loan was secured by a deed of trust on a commercial property located in Tustin. Mid-Wilshire was to repay the loan by making 59 monthly "regular payments" of \$30,889 each, followed by one "irregular last payment" of \$3,981,429. The first regular payment was due on February 15, 2008, and the irregular last payment was due on January 15, 2013.

In July 2008, Westlake took out a five-year loan from TomatoBank for \$9,204,000, secured by a deed of trust on a property located in Thousand Oaks. The loan agreement required Westlake to repay its loan by making 24 "monthly consecutive principal and interest payments" of \$51,239 each, starting on August 10, 2008; 35 "monthly consecutive principal and interest payments" of \$61,239 each, starting on August 10, 2010; and "one principal and interest payment" of \$8,378,121 on July 10, 2013.

Both loan agreements included late charge and default provisions: If a payment was made 10 or more days late, a "late charge" of five percent "of the regularly scheduled payment" would be imposed. Upon default, the interest rates on the loans would "immediately increase" by five percent.

TomatoBank subsequently agreed to extend the maturity date of both loans to December 15, 2013. In exchange, Westlake agreed that a second deed of trust on its Thousand Oaks property could be used to secure Mid-Wilshire's obligations on its loan.

Respondents failed to make their final loan payments within 10 days of the maturity date and were placed in default. TomatoBank told Mid-Wilshire that the interest rate on its loan had been raised by five percent and that it had an outstanding balance of \$3,934,271: \$3,892,996 in unpaid principal, \$22,742 in accrued interest, and \$18,533 in late charges on the "regular payments" it made more than 10 days late. The bank told Westlake that the interest rate on its loan had similarly increased by five percent. Its outstanding balance was \$8,340,367: \$8,219,995 in unpaid principal, \$49,948 in accrued interest, and \$70,425 in late charges for the "monthly consecutive principal and interest payments" made more than 10 days late. TomatoBank also told Respondents that they would incur "maturity" late charges equal to five percent of the unpaid principal on each of their loans as of the date of maturity, or \$194,650 for Mid-Wilshire and \$411,000 for Westlake.

TomatoBank sued Respondents to recover the outstanding balances on their loans and the associated maturity late charges. Leevil subsequently purchased the loans from TomatoBank, and substituted in as plaintiff in the lawsuit. While the suit was pending, Leevil proceeded with the nonjudicial foreclosure sale of the Respondents' property in Thousand Oaks. All of the debts they owed on their loans, including the \$194,650 and \$411,000 maturity late charges, were paid from the proceeds of the foreclosure sale.

After the sale, Leevil added a declaratory relief claim to its complaint, seeking an order from the trial court declaring that: (1) the \$194,650 maturity late charge assessed against Mid-Wilshire was proper, (2) the \$411,000 maturity late charge assessed against Westlake was proper, and (3) only Westlake had standing to seek a “refund or recoupment” of the maturity late charges since those charges were paid from the proceeds of the sale of the Thousand Oaks property. Respondents challenged the second portion of this claim (pertaining to the maturity late charge levied against Westlake) in a motion for summary adjudication. The trial court granted the motion, concluding that: (1) it did not violate section 437c, subdivision (f)(1), even though it did not dispose of the entire declaratory relief claim; (2) the terms of the loan agreement between Westlake and TomatoBank did not permit imposing a late charge on the final payment; and (3) even if it did, such a charge would amount to an unenforceable penalty under Civil Code section 1671, subdivision (b). Respondents then moved for judgment on the pleadings as to the first portion of Leevil’s claim (pertaining to the maturity late charge levied against Mid-Wilshire). The court also granted that motion, concluding that Mid-Wilshire’s loan agreement did not permit a late charge on the final payment. Even if it did, such a charge would be invalid under Civil Code section 1671.<sup>2</sup>

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<sup>2</sup> The trial court declined to decide the third issue in Leevil’s claim (whether only Westlake had standing to seek recoupment of the late charges), leaving that issue for the Orange County Superior Court to decide in a related action. Leevil does not challenge this portion of the court’s decision.

## DISCUSSION

### *Motion for summary adjudication*

Leevil contends the trial court erroneously granted Respondents' motion for summary adjudication because the motion did not dispose of its entire declaratory relief claim, in violation of section 437c, subdivision (f)(1). We disagree.

"A motion for summary adjudication shall be granted only if it completely disposes of a cause of action." (§ 437c, subd. (f)(1).) "A 'cause of action' is comprised of a 'primary right' of the plaintiff, a corresponding 'primary duty' of the defendant, and a wrongful act by the defendant constituting a breach of that duty." (*Crowley v. Katleman* (1994) 8 Cal.4th 666, 681 (*Crowley*).) "The manner in which a plaintiff elects to organize [their] claims within the body of the complaint is irrelevant to determining the number of causes of action alleged under the primary right theory." (*Hindin v. Rust* (2004) 118 Cal.App.4th 1247, 1257 (*Hindin*).) "If [the] plaintiff states several purported causes of action [that] allege an invasion of the same primary right [they have] actually stated only one cause of action." (*Ibid.*, alterations omitted.) "On the other hand, if [they] allege[] that the defendant's single wrongful act invaded two different primary rights, [they have] stated two causes of action . . . even though the two invasions are pleaded in a single [claim] of the complaint.' [Citation.]" (*Ibid.*)

We independently review whether the trial court properly determined that Leevil's declaratory relief claim involved more than one primary right when it granted Respondents' summary adjudication motion. (*Jacks v. City of Santa Barbara* (2017) 3 Cal.5th 248, 273.)

The trial court did not err. The first two portions of Leevil's declaratory relief claim involved two different loan agreements, each made at a different time by a different party. Each agreement formed the basis for a separate cause of action. (*Scripps Clinic v. Superior Court* (2003) 108 Cal.App.4th 917, 928-929 [interference with two separate contracts gave rise to two separate causes of action]; see also *Edward Fineman Co. v. Superior Court* (1998) 66 Cal.App.4th 1110, 1116-1118 [23 unauthorized checks gave rise to 23 causes of action]; *Lilienthal & Fowler v. Superior Court* (1993) 12 Cal.App.4th 1848, 1854 [claims related to two different legal matters involved "two separate and distinct causes of action"].)

The third portion of Leevil's claim involved neither loan agreement directly, but rather the separate question of which party could sue to recoup late charges wrongfully imposed under the agreements. Whether one or both Respondents can seek recoupment involves different elements than whether imposition of the late charges was proper, and any claim based on the fulfillment of those elements would have arisen at a different time. That renders the third portion of Leevil's claim separate from the first two. (*CDF Firefighters v. Maldonado* (2011) 200 Cal.App.4th 158, 165.)

Leevil counters that the late fees were all paid out of the proceeds from the foreclosure sale of the Thousand Oaks property, which renders its declaratory relief claim a single cause of action. But how the late charges were paid is not relevant to whether the charges were properly imposed. And while it may be relevant to who can recoup payment of any improperly imposed charges—an issue we do not decide here—our focus for purposes of section 437c, subdivision (f)(1), is on the injury *Leevil* allegedly

suffered, not on which Respondent paid those charges.<sup>3</sup> (*Crowley, supra*, 8 Cal.4th at p. 681 [“primary right is simply the *plaintiff’s* right to be free from the particular injury suffered” (italics added)].) The injury suffered is different than the remedy sought. (*Id.* at p. 682.)

This case is unlike *Hindin, supra*, 118 Cal.App.4th 1247, on which Leevil relies. In *Hindin*, the appellants “sought to vindicate a single primary right—the right to be free from defending against a lawsuit initiated with malice and without probable cause.” (*Id.* at p. 1258.) Though the defendant “allegedly breached that right in two ways, it nevertheless remained a single right.” (*Ibid.*) Here, in contrast, Leevil sought to vindicate three *different* primary rights: the right to a declaration that the late charges imposed against Mid-Wilshire were proper, the right to a declaration that the charges imposed against Westlake were proper, and the right to a declaration that only Westlake could sue to recover any improperly imposed charges. Its declaratory relief claim thus involved three separate causes of action. The trial court’s summary adjudication of just one of them was proper.

#### *Maturity late charges*

Leevil next contends Respondents’ loan agreements authorized imposition of the maturity late charges. We need not decide that issue because we conclude that the charges were invalid under Civil Code section 1671, subdivision (b).

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<sup>3</sup> Because our focus is on the invasion of Leevil’s primary rights, we deny its request to take judicial notice of the action Westlake filed to recoup the late fees. It is irrelevant to our analysis. (*Kinney v. Clark* (2017) 12 Cal.App.5th 724, 729, fn. 2.)

“[A] provision in a contract liquidating the damages for the breach of the contract is valid unless the party seeking to invalidate the provision establishes that the provision was unreasonable under the circumstances existing at the time the contract was made.” (Civ. Code, § 1671, subd. (b).) A liquidated damages provision will generally be unreasonable, and thus unenforceable, “if it bears no reasonable relationship to the range of actual damages that the parties could have anticipated would flow from a breach.” (*Ridgley v. Topa Thrift & Loan Ass’n* (1998) 17 Cal.4th 970, 977 (*Ridgley*)). “In the absence of such a relationship, a contractual clause purporting to predetermine damages ‘must be construed as a penalty.’ [Citation.]” (*Ibid.*) “A contractual provision imposing a “penalty” is ineffective.” (*Ibid.*)

Whether the maturity late charges imposed here “should be treated as liquidated damages or as . . . unenforceable penalt[ies] is a question of law, which we review de novo.’ [Citation.]” (*McGuire v. More-Gas Investments, LLC* (2013) 220 Cal.App.4th 512, 523.)

The trial court correctly determined that the maturity late charges imposed on Respondents constituted unenforceable penalties. An unenforceable penalty “usually becomes effective only in the event of default [citation] upon which a forfeiture is compelled without regard to the actual damages sustained by the party aggrieved by the breach [citation].” (*Garrett v. Coast & Southern Fed. Sav. & Loan Assn.* (1973) 9 Cal.3d 731, 739 (*Garrett*)). Late charges, such as those imposed on the “regular” or “monthly” payments Respondents made more than 10 days late, serve the dual purposes of “encourag[ing] the borrower to make timely future payments” and “compensat[ing] the lender for its administrative



expenses and the cost of money wrongfully withheld.” (*Id.* at pp. 739-740.) But the maturity late charges serve neither of these purposes.

As to the first, the maturity late charges would not encourage timely future payments because Respondents had no more payments to make. As to the second, when Mid-Wilshire made one of its regular payments late, it incurred a late charge of \$1,544. When Westlake made one of its monthly payments late, it incurred a late charge of between \$2,562 and \$3,062. But when Respondents were late in making their final payments, they incurred late charges more than *125 times* these amounts: \$194,650 for Mid-Wilshire and \$411,000 for Westlake. Nothing in the record suggests that TomatoBank’s administrative expenses on Respondents’ late final payments were so many orders of magnitude greater than the expenses on their late monthly payments. (Cf. *Ridgley, supra*, 17 Cal.4th at p. 978 [late charges unenforceable if they have “no reasonable relationship to the injury the creditor might suffer from such late payments”].)

Moreover, unlike the late charges on the monthly payments, which were tied to the amount of those payments, the late charges on the final payments were tied to the unpaid principal balances on Respondents’ loans. A late charge “measured against the unpaid balance of [a] loan must be deemed to be punitive in character.” (*Garrett, supra*, 9 Cal.3d at p. 740.) “It is an attempt to coerce timely payment by a forfeiture [that] is not reasonably calculated to merely compensate the injured lender.” (*Ibid.*)

*Poseidon Development, Inc. v. Woodland Lane Estates, LLC* (2007) 152 Cal.App.4th 1106, cited by the trial court, illustrates these principles. The loan agreement in

*Poseidon* provided for a late charge equal to 10 percent of the overdue amount on any installment payment (*id.* at p. 1112), which was intended to cover the lender’s “processing and accounting charges” (*id.* at p. 1115). That amounted to a late charge of \$614.67 on an overdue monthly payment, but a charge of \$77,614.67 if the final payment were overdue. (*Ibid.*) The *Poseidon* court concluded that the late charge provision did not apply to the final payment because “it could not possibly be considered a reasonable estimate of the damages contemplated by a breach.” (*Ibid.*) “[A]s a matter of law a late charge provision covering administrative expenses that amounts to \$614.67 for one late payment and \$77,614.67 for another is not a reasonable attempt to estimate actual administrative costs incurred.” (*Id.* at p. 1116.) It was thus an unenforceable penalty under Civil Code section 1617, subdivision (b) (*ibid.*), just like the maturity late charges imposed on Respondents.

DISPOSITION

The judgment is affirmed. Respondents shall recover their costs on appeal.

NOT TO BE PUBLISHED.

TANGEMAN, J.

We concur:

YEGAN, Acting P. J.

PERREN, J.

Vincent J. O'Neill, Jr., Judge  
Superior Court County of Ventura

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